SUPREME COURT, U. S.

No. 417

Supreme Court, U.S.
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In the Supreme Court of the United States

EFRAIM SANTOR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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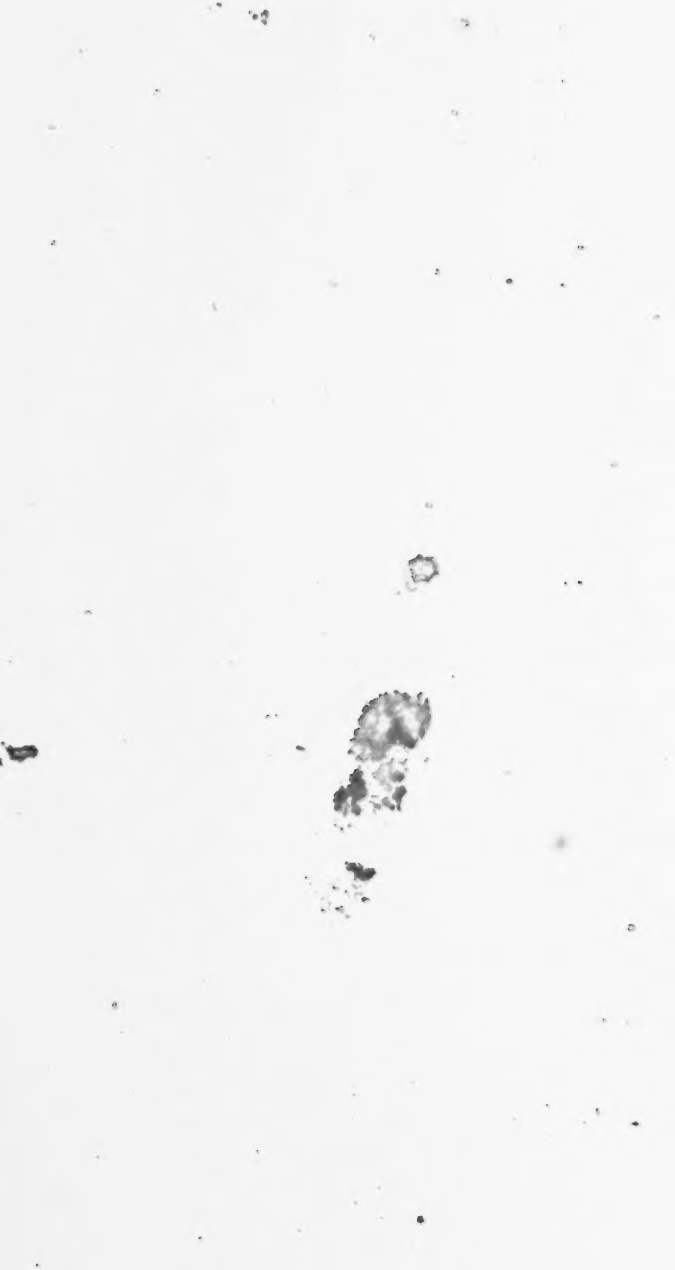
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Efrain Santos respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 14, 1970.

OPINIONS BELOW

The judgment and order of the United States District Court for the Northern District of Indiana is not officially



reported. The opinion of the United States Court of Appeals for the Seventh Circuit entered on April 14, 1970, has not yet been officially reported. It is attached to this Petition as Appendix "A". The previous judgment and opinion of the Court of Appeals for the Seventh Circuit herein, which was vacated by this Court on February 21, 1970 (O.T. 1969, No. 861), is reported in 417 F. 2d 340 (7th Cir. 1969).

JURISDICTION

The judgment of the Court of Appeals affirming in part and reversing in part the judgment and order of the district court was entered on April 14, 1970. A Petition for Rehearing was timely filed, and denied on June 22, 1970. (The order denying the petition for a rehearing is attached as Appendix "B".) The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner was denied the effective assistance of counsel where the same counsel represented both petitioner and two co-defendants, and

(a) The trial court did not advise him of his right to representation by separate counsel;

(b) Both co-defendants entered pleas of guilty at the close of the government's case and the court so advised the jury; and

(c) The nature of the charge required that petitioner disassociate himself from his co-defendants and counsel made no effort to do so.

2. Whether the convictions under the statute held constitutional in *Buie* should be vacated because they were

the fruit of, and charged jointly in an indictment with, an offense under the statute held unconstitutional in *Leary*.

3. Whether only two separate buyer-seller relationships (and not two conspiracies) were proven.

4. Whether failure of proof of the conspiracies charged requires that the convictions on the substantive counts be set aside where admission of prejudicial statements of co-defendants was predicated only on the unproven charge of conspiracy.

5. Whether retroactive application of *Bruton* to the facts of the instant case requires that the convictions be set aside because the trial court failed to require proof of conspiracy before admitting statements of co-defendants prejudicial to petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner was originally charged in five counts of a six count indictment along with co-defendants DeJesus, Morales and Raymond and Francisco Arroyo with violation of the marijuana tax laws of the United States and with conspiracies to violate the same on two separate occasions.

Count one charged that on April 16, 1966, petitioner conspired with Morales and the Arroyo brothers to violate 26 U.S.C. 4742(a) (sale of marijuana not in pursuance of a written order form), in violation of 18 U.S.C. 371. Count two charged that on the same day the same defendants committed the substantive offense of violating 26 U.S.C. 4742(a). Count three charged that on the same date petitioner, Morales, and one of the Arroyos committed the substantive offense of violating 4744(a)(1) (being a transferee of marijuana without paying the transfer tax). (R. 3)*

Count four charged that on May 4, 1966, petitioner conspired with DeJesus and the Arroyo brothers to violate the same statute (4742(a)) and count five charged the same defendants with the substantive offense of violating *the same statute on* the same date.

The Arroyo brothers pleaded guilty prior to trial. Petitioner stood trial along with DeJesus and Morales, who were represented by the same counsel as represented petitioner. At the close of the government's case, DeJesus and Morales entered pleas of guilty.

Petitioner's conviction was affirmed on November 13, 1967 (*United States* v. *Santos*, 385 F.2d 43, cert. denied 390 U.S. 954).

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* "R" refers to the original record of proceedings which along with the transcript of the trial is part of the record in this case.

Subsequently, on appeal from denial of a motion pursuant to 28 U.S.C. 2255, the Court of Appeals for the Seventh Circuit held that all of the marijuana statutes involved were unconstitutional. *Santos* v. *United States*, 417 F.2d 340 (7th Cir. 1969). Following the decision of this Court in *Buie* v. *United States*, 396 U.S. 69 (1969), upon the government's petition for certiorari and upon petitioner's memorandum in opposition thereto, this Court vacated the judgment of the Court of Appeals and remanded the case for further consideration in light of *Buie*. On April 14, 1970, the Court of Appeals entered a new judgment and filed a new opinion reversing the denial of relief as to petitioner's convictions under 26 U.S.C. 4744(a)(1) (count three), but affirming his convictions under the conspiracy counts and the other substantive counts.

The Evidence

Two separate purchases of marijuana were made in East Chicago, Indiana, on April 16, 1966 and May 4, 1966 by the Arroyo brothers and an informant from petitioner. Morales in one instance and DeJesus in the other acted as a "go-between" between the Arroyos and petitioner. The informant was not produced as a witness at the trial and the government's case consisted almost entirely of the testimony of Agent Coulter and a surveilling agent (Agent Cruz).

Coulter testified that on April 16, 1966, he and his partner Cruz met the informant Reyes at the latter's residence in Chicago. Over repeated objections by defense counsel, who represented both petitioner, Morales and DeJesus, Agent Coulter related a conversation with the Arroyos relative to purchasing marijuana from Raymond Arroyo.

Agent Coulter then testified that he and Arroyo drove to East Chicago, Illinois, where he again had a conversation with Arroyo. Over objection, Coulter was allowed to testify that the conversation was "relative to him going to meet a person by the name of Frankie Santos to get the marijuana." (Tr. 100)* Defense counsel's motion that the answer be stricken and the jury instructed to disregard it on the grounds that no conspiracy had been established was denied.

A sidebar conference was then held at which defense counsel argued that the testimony was so prejudicial as to petitioner that a limiting instruction would serve no useful purpose because the jury could not possibly ignore it, that the purpose of the testimony was not merely "preliminary" but was introduced to prove a conspiracy by the extrajudicial conversation with a co-conspirator made out of petitioner's presence, and moved for a mistrial. The court denied the motion, but did give a cautionary instruction that the testimony could not be considered "at this time" against any of the defendants on trial.

A few moments later the witness again stated that he had told Arroyo that he had $300 to spend and stated that Arroyo told him "he would go see Santos." Following another sidebar conference, a motion for a mistrial was denied.

Coulter testified further that while driving around East Chicago looking for petitioner, Arroyo happened to see him on the street and followed him to a bar in East Chicago. Arroyo then left Coulter's car and had a brief conversation with petitioner. (Tr. 105-6)

Arroyo then returned to the car. Over objection, Coulter testified that Arroyo told him that petitioner had to send

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* "Tr." refers to the transcript of trial proceedings.

someone for the marijuana and he needed $50 "out front to make the thing move." (Tr. 110) Coulter gave Arroyo the money and Arroyo walked across the street, met with petitioner and their hands extended, after which petitioner placed his hands in his pocket. Petitioner then entered a doorway immediately south of the Frontier Bar at 3320 Michigan.

Arroyo returned to the car. Over objection, Coulter testified that Arroyo told him that he (petitioner) was sending somebody after the marijuana and that they should have a cup of coffee. A defense motion that the testimony be stricken was denied.

After having a cup of coffee in a restaurant, Morales delivered a shopping bag of marijuana to Arroyo and Arroyo gave Morales the money. Petitioner never reappeared on the scene.

A few weeks later, on May 4, 1966, Coulter again met with Reyes the Arroyo brothers in Chicago and told them he had about $500 to spend. Coulter testified, over objection, that they would have to go back to the harbor to see petitioner. Several similar statements of the Arroyos which incriminated petitioner were admitted over objection. Motions for a mistrial were denied.

After a discussion of the price in a restaurant in East Chicago, in which petitioner's name was again mentioned over objection, Raymond Arroyo left the restaurant and reentered the doorway at 3320 South Michigan Avenue. Five minutes later, he came out of the doorway in the company of petitioner who entered the restaurant while Raymond Arroyo remained outside. Petitioner greeted the informant and Francisco Arroyo and then walked over to another person who was identified as DeJesus. Petitioner and DeJesus then walked out of the restaurant and met

Raymond Arroyo. After a brief conversation, all three entered the doorway at 3320 South Michigan.

At approximately 8:45 p.m., petitioner came out of the doorway and reentered the restaurant. Inside the restaurant, petitioner said to Francisco Arroyo in Spanish, "everything is ready, let's go." The informant interpreted the Spanish to Coulter. Petitioner had a brief conversation with Francisco Arroyo and Arroyo told Coulter that petitioner was angry about bringing him along. Coulter and the informant then left the restaurant and returned to the car.

Petitioner was observed leaving the restaurant with DeJesus. Outside the restaurant, he had a brief conversation with Francisco Arroyo and then Arroyo entered the agent's car. Petitioner crossed the street.

A few minutes later, Coulter observed DeJesus and Raymond Arroyo walking towards them and enter the car. DeJesus placed a brown bag on the floorboard in the back seat, walked over and met petitioner on the other side of the street. The two of them then reentered the doorway at 3320 South Michigan.

After the government rested, both DeJesus and Morales entered pleas of guilty and, without objection, the jury was so advised (Tr. 224), although prior to trial counsel had objected to advising the jury that the Arroyos had pleaded guilty because it might prejudice the defendants on trial. (Tr. 2-4) Petitioner presented no evidence and the jury returned a verdict of guilty.

REASONS FOR GRANTING THE WRIT

1. **Petitioner was denied the effective assistance of counsel because he was represented by the same lawyer who represented two co-defendants who entered pleas of guilty at the close of the government's case, because the nature of the charges required that he disassociate himself from both co-defendants and because he was not advised of his right to representation by separate counsel.**

Petitioner respectfully urges this Court grant the petition and reverse the judgment of conviction because petitioner was prejudicially denied his Sixth Amendment right to effective assistance of counsel and because this petition presents new and significant issues concerning the duty of the trial court where two or more defendants are represented by the same counsel—an issue not dealt with by this Court since its opinion in *Glasser* v. *United States*, 315 U.S. 60 (1941) and because there exists a conflict in circuits as to the duty of the trial court to warn persons represented by the same counsel to their right to representation by separate counsel.

A.

There is a conflict in circuits as to the duty of the trial court to advise petitioner of his right to be represented by separate counsel.

Petitioner respectfully requests this Court consider and decide that failure of the trial court to advise him of his right to representation by separate counsel (either retained or appointed) denied to petitioner the free and unencumbered exercise of his Sixth Amendment right to effective assistance of counsel. Petitioner relies principally upon the decision of this Court in *Glasser* v. *United States*, 315 U.S. 60 (1941) where this Court emphasized that ". . . the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused" rests upon

the trial judge (*Glasser* v. *United States*, 315 U.S. 60, 71) and upon *Campbell* v. *United States*, 352 F.2d 359 (D.C. Cir. 1965).

Campbell, in reliance upon *Glasser*, held, in an opinion by Circuit Judge Washington (concurred in by Circuit Judge (now Chief Justice) Burger), that where as here multiple defendants are represented by the same *retained* counsel the trial court has a duty to warn defendants of their right to representation by separate counsel. The court said:

> "When two or more defendants are represented by a single counsel, the District Court has a duty to ascertain whether each defendant has an awareness of the potential risk of that course and nevertheless has knowingly chosen it." *Campbell* v. *United States*, 352 F.2d 359, 360.

Continuing, Circuit Judge Washington stated the holding of the case as follows:

> "We hold only that a trial judge has a responsibility to assure that co-defendants' decision to proceed with one attorney is an informed decision. Since the trial judge herein apparently failed to fulfill this responsibility and Glenmore was clearly prejudiced by the fact that he shared an attorney with his co-defendant, his conviction must be reversed." *Campbell* v. *United States*, 352 F.2d 359, 361.

As is apparent in a reading of *Campbell* that it is of no significance that petitioner was represented by retained (rather than appointed) counsel. Indeed, where two or more defendants have retained the same counsel the likelihood that joint-representation results from the fact they are each unable to afford separate counsel should impose an even greater duty upon the court, namely, to advise each defendant of his right to representation by separate counsel and *in addition* to advise him that if he cannot

retain separate counsel one will be *appointed* for him by the Court.

It is likewise apparent from a reading of *Campbell* that there exists a direct conflict between the rule of the Circuit for the District of Columbia and the Seventh Circuit as respects the duty of the trial court. (The conflict is not apparent from a reading of the opinions below due to the summary treatment accorded this issue by the Court of Appeals.)* To resolve this conflict and "further explicate"** the duties of the trial court under *Glasser*, it is respectfully requested that the petition be granted.

B.

Petitioner was denied the effective assistance of counsel because two co-defendants represented by the same counsel entered pleas of guilty.

Petitioner respectfully submits that the entry of guilty pleas by both co-defendants represented by counsel for petitioner at the close of the government's case and the fact that the court, without objection, so advised the jury (Tr. 224) effectively compounded the prejudice already attendant upon joint representation and denied to petitioner the effective assistance of counsel. Indeed, the

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* This issue was raised in the original petition for relief pursuant to 28 U.S.C. Sec. 2255, denied by the district court. The issue was three times presented to the Court of Appeals, which, in its original opinion found it unnecessary to reach the issue because it reversed on constitutional grounds. (*Santos* v. *United States*, 417 F.2d 340, 342, n. 1) After remand from this Court, the Court of Appeals summarily dismissed the issue as "without merit." (Appendix "A," p. 3, n. 3) The issue was presented again in petitioner's petition for rehearing, denied on June 22, 1970. In each instance *Campbell* was cited and relied upon by petitioner.

** See *Spinelli* v. *United States*, 393 U.S. 410, 412 where this Court granted certiorari on the grounds that the principles of *Aguilar* v. *Texas*, 378 U.S. 108 (1964) "should be further explicated."

entry of a guilty plea by a co-defendant (even where represented by *separate* counsel) is in itself sometimes so prejudicial as to require reversal of a conviction. (*Rogers* v. *United States*, 304 F.2d 520 (5th Cir. 1962)) Where as here the charge is one of conspiracy and the two co-defendants were intimately tied by the evidence to petitioner, how could counsel for petitioner effectively defend the charges against petitioner after the co-defendants pleaded guilty? Indeed, in his argument to the jury, counsel for petitioner argued to the jury that the government's case was predicated upon "guilt by association." (Tr. 246) Certainly the jury could and probably did conclude that petitioner was indeed guilty by virtue of his association with DeJesus and Morales not only on the date of the alleged offenses but more importantly at the trial where they were represented by the same counsel. Insofar as petitioner's defense was "guilt by association," counsel was of course necessarily inhibited in argument to the jury. How could he argue that the Arroyos, DeJesus and Morales were guilty and petitioner was innocent when he had throughout the trial represented both DeJesus and Morales as well as petitioner and thus represented to the jury that *each* of his three clients was *not guilty* of the offense charged? Clearly, after (if not before) entry of the guilty pleas counsel for petitioner was most assuredly ". . . embarrassed and inhibited" in the presentation of petitioner's defense. (*Glasser* v. *United States*, 315 U.S. 60, 72).

Of course counsel's effectiveness in posture of this case diminished if not totally destroyed by the fact that the trial court advised the jury that co-defendants DeJesus and Morales had entered pleas of guilty. Counsel's failure to object to so advising the jury of the guilty pleas of Morales and DeJesus underscores the difficult and impos-

sible position in which he found himself when they changed their pleas and indicated the extent to which he must necessarily have felt inhibited and embarrassed, for, significantly, he did object prior to trial to informing the jury of the guilty pleas of the Arroyos who were not on trial and had not been represented by him.*

C.

Petitioner was denied the effective assistance of counsel because the nature of the charge required that petitioner disassociate himself from the co-defendants represented by the same counsel.

The very nature of the charge of conspiracy (and most particularly in the posture of this case) required that counsel for petitioner devote every effort to disassociating petitioner from both the Arroyo brothers and co-defendants DeJesus and Morales. As observed by this Court in *Glasser*,

> "In conspiracy cases . . . it is especially important that [a defendant] be given the benefit of the undivided assistance of his counsel . . ." (*Glasser* v. *United States*, 315 U.S. 60, 76)

In the instant case, the significance and necessity for disassociating petitioner from both the Arroyos and DeJesus and Morales gained in importance because the specific charge (*i.e.*, conspiracy to sell marijuana) lends itself to a defense based upon the rule that buyers and sellers (as participants in a simple sale and absent a "prior or contemporaneous understanding" as to other dealings) can-

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* Nor did counsel move for a mistrial. His actions are, of course, understandable in view of the sensitivities of any trial court to the possibility of abuse of joint representation by creating an automatic mistrial by pleading one of his clients guilty in the middle of the trial.

not be charged with conspiracy. (*United States* v. *Ford*, (7th Cir. 1963), 324 F.2d 950, 952; *United States* v. *Varelli*, (7th Cir. 1969), 407 F.2d 735, 748) Accordingly, it was incumbent upon counsel for petitioner to show by cross-examination and by evidence that the co-defendants were acting as agents of the buyers (the Arroyos) and not of the seller (Santos).

The record demonstrates a total failure of counsel to attempt to disassociate petitioner from co-defendants DeJesus and Morales. Most apropos are the words of the court in *Campbell* v. *United States*, 352 U.S. 359 (D.C. Cir. 1965) that

> ". . . defense counsel made no effort to disassociate Glenmore from Campbell, against whom the government had presented a stronger case . . ." (*Campbell* v. *United States*, 352 F.2d 359, 361)

A fortiori, where as here the government not only presented a stronger case against DeJesus and Morales (who in each instance actually delivered the marijuana) but DeJesus and Morales *pleaded guilty* and thereby conclusively established their guilt in the eyes of the jury, the need for petitioner to disassociate himself from the guilty co-defendants was imperative. Of course, as the guilty plea came at the close of the government's case, any attempt to disassociate petitioner from his co-defendants during presentation of the government's case was inhibited by counsel's joint representation of all defendants. Moreover, counsel did not, as he might have done had he represented petitioner alone, call or attempt to call Morales and DeJesus as defense witnesses. Finally, an examination of counsel's argument to the jury shows not even a belated attempt to disassociate petitioner from the guilty pleaders. Indeed, as urged above, counsel, who by virtue of his joint representation of the co-defendants who throughout the government's case had contended to the jury that they

too were not guilty, could not effectively now even argue that entry of guilty pleas by the co-defendants reflected favorably upon petitioner. Clearly, such an argument would have sounded disingenuous to the jury and counsel was "embarrassed and inhibited" in arguing petitioner's case to the same jury which had heard him defend Morales and DeJesus. (*Glasser* v. *United States*, 315 U.S. 60, 72)

Importantly, here as in *Glasser* the government implicitly if not explicitly, by pointing out to the jury that ". . . the government did not produce a lot of witnesses as trials go" (Tr. 227), admitted that ". . . the case against [petitioner] is not a strong one" (*Glasser* v. *United States*, 315 U.S. 60, 67). And an examination of the evidence fully supports this view—for Santos' participation in the offenses charged was marginal and his guilt was predicated upon thin and tenuous circumstantial evidence.

It is no answer that counsel for petitioner otherwise ably represented petitioner. Important in this context is the observation of the Court of Appeals for the Seventh Circuit in *Zurita* v. *United States*, 410 F.2d 477 (7th Cir. 1969) (involving the same trial counsel who represented petitioner) that, although the district court found that counsel presented an "apparently zealous defense of petitioner," defendant was denied the right to effective assistance of counsel where there existed a conflict of interest, even though unconscious, which ". . . might require less than an undivided fidelity toward either client." (*Zurita* v. *United States*, 410 F.2d 477, 480)

In sum, it is clear that counsel's defense of petitioner was not and could not have been ". . . as effective as it might have been" (*Glasser* v. *United States*, 315 U.S. 60, 76) had counsel not also represented the co-defendants. This Court should therefore grant the writ to resolve the existing conflict in circuits as to whether the trial court has an affirmative duty to warn a defendant of his right

to representation by separate counsel and to decide whether petitioner (and defendants similarly situated) are denied the effective assistance of counsel where co-defendants represented by the same counsel enter pleas of guilty and where the nature of the charge requires that a defendant disassociate himself from his co-defendants.

2. **The convictions on counts charging violations of Sec. 4744(a) (transfer not in pursuance of a written order form) are invalid because they are the fruit of the illegal conviction of violating Sec. 4742(a) (transferee not having paid the transfer tax) and because joinder of counts charging a violation of an offense under a constitutional statute (4744(a) (order form)) with a count charging violation of an unconstitutional statute (4742(a) (transfer tax)) effectively violated petitioner's Fifth Amendment privilege against self-incrimination.**

The petition should be granted to resolve the issue presented in this argument which results directly from the Court's decisions in *Leary* and *Buie* and which of necessity must exist in numerous cases pending in the Courts of Appeals following the respective decisions of this Court in *Leary* and *Buie*. The theory and premise upon which this argument is based is that the government cannot join in the same indictment an offense which would require self-incrimination (the *Leary*-type offense) with a related and similar offense (the *Buie*-type offense) without vitiating the entire indictment because the risk of exposure under *Leary* extends to and infects the counts which (following the holding of *Buie*) if charged in a separate and distinct indictment would not violate the Fifth Amendment. This result is particularly present where, as here, the offense charged under the statute declared unconstitutional in *Leary* is prior in time to the other related offenses charged.

A.

The convictions on the remaining counts should be reversed under the doctrine of the fruit of the poisonous tree because they result directly from violation of petitioner's Fifth Amendment privilege.

Taking the offenses charged in the indictment in their necessary chronological order, the first offense with which petitioner was charged was being a transferee of marijuana without having paid the transfer tax on April 16, 1966 (count three). There followed the charges of sale (*i.e.*, being a transferor) of marijuana not in pursuance of a written order form and conspiracy to commit the same offense on April 16, 1966 (counts one and two). Finally, defendant was charged with sale of marijuana not in pursuance of a written order form on May 4, 1966 (count five) and conspiracy to commit the same offense on the same date (count four).

This order of events must necessarily follow because petitioner must have acquired the marijuana (*i.e.*—become a transferee of marijuana) on April 16, 1966, and thus committed the offense charged in count three under the statute held unconstitutional in *Leary* v. *United States*, 395 U.S. 6 (1969), *before* he committed or for that matter could commit the offense charged in count two by becoming a transferor of marijuana and *before* he conspired (or joined the conspiracy) to transfer marijuana not in pursuance of a written order form. In other words, he necessarily had to *acquire* the marijuana (in violation of 4744(a)(1)) *before* he *transferred* it (in violation of 4742 (a)) or conspired to transfer it.

Inasmuch as the offense of acquisition of marijuana was *prior in time* to the later offenses, and inasmuch as the conviction on that offense (charged in count three) was

obtained in violation of petitioner's Fifth Amendment privilege against self-incrimination, it necessarily follows that the later offenses are each and all tainted by the illegal obtaining of evidence and conviction of the offense under the statute held unconstitutional in *Leary* v. *United States*, 395 U.S. 6 (1969). Accordingly, judgment of conviction on each of the subsequent convictions should be reversed pursuant to the doctrine of the "fruit of the poisonous tree."* *Nardone* v. *United States*, 308 U.S. 338, 441 (1939); *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

B.

Where violations of 4742(a) and 4744(a)(1) are charged in the same indictment, the privilege against self-incrimination is effectively violated.

Quite apart from the chronological sequence of events, it is respectfully submitted that where as here a defendant is charged in the same indictment with *both* the offense of being a transferee without having paid the transfer tax and the offense of being a transferor not in pursuance of a written order form, with the same marijuana being involved in each charge, his Fifth Amendment privilege is effectively violated within the meaning of *Leary* because he would be required to *expose himself to the authorities* by compliance with one of the statutes named in the indictment (the *Leary* statute), thereby exposing himself as to the other charges. Specifically, petitioner, by being required to expose himself to the authorities as a violator of 4744(a)(1), in violation of the Fifth Amendment, would

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* This includes the offenses charged on May 6, 1966, for as the government's evidence shows, the marijuana purchased on that date was part of the same batch previously acquired by petitioner. (According to Agent Coulter, Raymond Arroyo told him that petitioner on May 4, 1966, "only had a pound and a half left." (Tr. 125)

at the same time be exposing himself as a transferor or a potential transferor or violator of 4742(a) and would thus be giving evidence against himself as to the remaining charges in the indictment. To state the matter another way, the significance and importance of the distinction, recognized in and underlying the decision of this Court in *Buie* between a *transferee* and a *transferor* is of no significance where the same defendant is charged *in the same indictment with being both a transferee and a transferor of the same marijuana.*

The importance of the joint charges in the instant case—as compared to a violation of 4742(a) alone, in *Buie*—is best and readily appreciated by a reading of *Leary.* In *Leary,* this Court held that petitioner's Fifth Amendment privilege was violated because to comply with the statutes there in question (26 U.S.C. 4741(a) and 4744(a)), petitioner would have to provide "a significant 'link in a chain' of evidence tending to establish his guilt." *Leary* v. *United States,* 395 U.S. 6, 16 (quoting *Marchetti* v. *United States,* 390 U.S. 39, 48). In other words, petitioner in *Leary,* who as an unregistered possessor of marijuana was part of a "selective group inherently suspect of criminal activities," would be required by compliance with the statute, ". . . unmistakenly to identify himself as a member of this 'selective' and 'suspect' group." The "real and appreciable" hazard of incrimination (*Leary* v. *United States,* 395 U.S. 6, 18), of course, resulted from the fact that petitioner must disclose his identity as a "suspect" possessor of marijuana.

Turning to the facts of the instant case, it is obvious that as respects one count of the indictment, charging petitioner with a violation of 4744(a)(1), a similar real and appreciable hazard of self-incrimination and exposure as a violator of that statute existed by virtue of

the disclosure requirements and the Court of Appeals, applying *Leary*, correctly reversed the judgment of conviction under that statute (count three). But how could petitioner comply with the statute underlying count three (4744(a)(1)) without *exposing himself* as to the remaining offenses charged?

The result here urged is not at all inconsistent with the decision of this Court in *Buie*, for in *Buie*, significantly, the unusual situation present here was not presented because in *Buie* there was no joinder of offenses as there is here. *Buie* was charged only with being a transferor not in pursuance of a written order form and not with violation of the statute held unconstitutional in *Leary*.

The importance of consideration of the entire indictment is apparent from the emphasis in *Leary* (which was *not overruled* by *Buie*) upon the "statutory scheme" of the marijuana tax laws. Where, as here, the indictment is drawn in such a way that a part of it would require a defendant to expose himself to the authorities in violation of the Fifth Amendment, the entire indictment is invalid and any conviction obtained thereon should be set aside.

3. The convictions on the conspiracy counts are invalid because no conspiracy was proven, but only two separate buyer-seller relationships were shown.

The evidence adduced at the trial, viewed in a light most favorable to the government, showed that on April 16, 1966, petitioner sold marijuana to the two Arroyos. On May 4, 1966, the pattern was repeated, with petitioner selling marijuana again to the Arroyos. (The agent never participated in the negotiations for the sale which was thus made directly to the Arroyos, casting them in the role of *buyers* and not (as charged in the indictment) as *sellers*. As for the roles of Morales and DeJesus, who acted as

the "go between," it is clear that they acted as either the agents of the buyers (the Arroyos) or petitioner (the seller).

Inasmuch as buyers and sellers, absent a prior or contemporaneous understanding, cannot be charged with or convicted of conspiring with each other, the conviction violated the decisions of the Court of Appeals for the Seventh Circuit in *United States* v. *Ford*, 324 F.2d 950 (1963) and *United States* v. *Varelli*, 407 F.2d 735 (7th Cir. 1969). As observed in *Ford*,

> "The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property although both parties know of the stolen character of the goods. In such circumstance, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective. *United States* v. *Ford*, 324 F.2d 950, 952.

The fact that there are multiple sellers and buyers—as here and in *Varelli*—does not render them conspirators. Nor does the fact that there were two separate and distinct purchases by the same buyers (the Arroyos) from petitioner on April 16, 1966 and May 4, 1966, in itself show the required "prior or contemporaneous understanding" (*United States* v. *Ford*, 324 F.2d 950, 952). Had there been any evidence of such an understanding, clearly one continuing conspiracy—and not two—would have been charged in the indictment and proven at the trial. Accordingly, the convictions on counts one and four of the indictment are invalid and should be set aside.*

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* Although the sufficiency of the evidence of conspiracy was once ruled upon by the Court of Appeals in *United States* v. *Santos*, 385 F.2d 43 (1967), the specific issue raised here was not there presented to the court.

4. Failure of proof of conspiracy requires reversal of the substantive offenses charged because Santos was prejudiced by admission of a co-defendant's statements which admission was predicated solely upon the unproven charge of conspiracy.

As the conspiracies charged were not proven (as urged in Argument 3 above), admission over repeated objection of counsel for the defense of the statements of the Arroyos which incriminated petitioner violated the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968). Counsel for petitioner repeatedly objected to admission of the out-of-court and inadmissible (as against petitioner) statements of the Arroyos to the effect that they were going to purchase marijuana from him. (A. 13-21). Correctly anticipating the ruling of this Court in *Bruton*, counsel urged that the jury could not follow the limiting instructions imposed by the court and could not ignore the highly incriminating statements of the Arroyos made out of the presence of petitioner. (A. 17). Repeated motions for a mistrial were made and denied. Inasmuch as the position taken by trial counsel was ultimately vindicated by this Court in *Bruton*, judgment of conviction as to the substantive counts charged should be reversed.

5. Failure of the trial court to require proof of conspiracy prior to the admission of the statements of the Arroyos which incriminated Santos requires that the conviction be set aside.

The writ should be granted to determine whether, as petitioner respectfully submits, the decision of this Court in *Bruton* v. *United States*, 391 U.S. 123 (1968) requires, at least where as here the evidence of conspiracy is weak absent inadmissible hearsay declarations of alleged co-conspirators, that the government first prove (by evidence *aliunde* the inadmissible hearsay) the existence of the con-

spiracy and petitioner's involvement in the same before allowing the jury to hear testimony as to the statements of alleged co-conspirators implicating petitioner where their admission into evidence is predicated solely upon proof of conspiracy.

Even assuming *arguendo* that a conspiracy was proven, petitioner submits that failure of the trial court to require, as requested by counsel, a showing that a conspiracy existed and that petitioner joined the conspiracy before admitting the highly incriminating testimony of what the Arroyos said to Coulter about petitioner requires reversal. Admittedly, this issue—*i.e.*, the order of proof of conspiracy—was presented to and ruled upon by the Court of Appeals in petitioner's original appeal from his conviction. (*United States* v. *Santos*, 385 F.2d 43) At that time, however, the court did not have the benefit of the ruling of this Court in *Bruton*, which by virtue of its retroactivity, must necessarily be applied to the facts of the instant case.

Directly supporting this contention is reliance by this Court in *Bruton* on the statement of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, that

> "The naive assumption that prejudicial effect can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U.S. 440, 453.

Importantly, *Krulewitch* was a conspiracy case and Justice Jackson was speaking directly to the issue here presented again to this Court—namely, the *order of proof:*

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its

> execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal* v. *United States*, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 F.2d 54." *Krulewitch* v. *United States*, 336 U.S. 440, 453.

Where, as here, the evidence is close and there are no incriminating admissions by petitioner indicating his participation in the conspiracy charged,* but his participation is based entirely upon observed association with alleged co-conspirators, it is respectfully submitted that *Bruton* now requires that a strict order of proof be followed (as was requested repeatedly by counsel below), and that in the instant case ". . . a conspiracy [was] proved by evidence that [was] admissible only upon the assumption that conspiracy existed". (*Krulewitch* v. *United States*, 336 U.S. 440, 453).

Indeed, it is submitted that petitioner was entitled to a hearing out of the presence of the jury as to whether or not there was a *prima facie* case of conspiracy of his alleged co-conspirators. (*Jackson* v. *Denno*, 378 U.S. 368 (1964))

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* Save for one statement, attributed to him by Coulter, in Spanish, "everything is ready let's go," a statement which the informant in testimony subsequent to the trial denied that petitioner made.

The instant case presents an issue certain to recur with increasing frequency in the wake of *Bruton* and arising particularly from reliance by this Court in *Bruton* upon the concurring opinion of Mr. Justice Jackson in *Krulewitch*. Whether resolved favorably or unfavorably to petitioner, the issue is significant to the administration of justice in the United States District Courts and should be resolved by this Court.

CONCLUSION

For the reasons urged herein, it is respectfully requested that this Court grant the petition and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APRIL 14, 1970

Before MAJOR and HASTINGS, *Senior Circuit Judges* and CUMMINGS, *Circuit Judge.*

HASTINGS, *Senior Circuit Judge.* These cases are before us pursuant to an opinion and order of the United States Supreme Court, in No. 861, *United States* v. *Santos, et al.*, ... U.S. ..... (February 24, 1970) vacating our prior judgments and remanding these cases to us for further consideration in light of *Buie* v. *United States,* 396 U.S. 87 (1969).

When these cases first came before us, we held that the Fifth Amendment, as applied by the Supreme Court in *Leary* v. *United States,* 395 U.S. 6 (1969), and *United States* v. *Covington,* 395 U.S. 57 (1969), required the reversal of the district court's denial of Santos' motion, filed pursuant to 28 U.S.C.A. § 2255, for collateral relief from a judgment of conviction under 26 U.S.C.A. §§ 4742 (a), 4744(a)(1) and 18 U.S.C.A. § 371. *Santos* v. *United States,* No. 16985, 417 F. 2d 340 (1969). We reached the same conclusion as to the district court's denial of Ward's similar petition for relief from a conviction under 26 U.S.C.A. §§ 4742(a) and 4744(a)(1). *Ward* v. *United States,* No. 16955, 420 F. 2d 904 (1969).[1]

[1]Although we decided *Santos* and *Ward* in separate opinions in 1969, we now consolidate them for final disposition, as did the Supreme Court. The Supreme Court also consolidated *United States* v. *Perlman,* No. 873, with *Santos* and *Ward*. *Perlman* was decided by another panel of our court in No. 17543, *United States* v. *Perlman,* in an unpublished order dated September 23, 1969. We leave the final disposition of *Perlman* on this remand to such panel.

Our prior judgments rested, in part, on the premise that "the net legal effect of § 4742(a) is to place the criminal transferor [of marihuana] in the position of being statutorily *required* to provide the government with information 'which would surely prove a significant "link in the chain" of evidence tending to establish his guilt.' * * * This is true since the order form mandate of § 4742(a) compels the criminal transferor to require the transferee to obtain an order form and to identify him not only as a transferor of marihuana but as a transferor who has not registered and paid the occupational tax required by §§ 4751-4753." *Santos, supra,* 417 F. 2d at 344.

In *Buie,* the Supreme Court found it "unnecessary to appraise [such reasoning] in detail because we have concluded that there is no real and substantial possibility that Buie's purchaser, or purchasers generally, would be willing to comply with the order form requirement [under § 4742(a)] even if their seller insisted on selling only pursuant to the form prescribed by law." *Buie, supra,* 396 U.S. at 91.

The Court further found that Buie's situation "bears little resemblance to the situation which confronted Leary," *Id.* at 92.[2] It concluded that there "is no real and substantial possibility that the § 4742(a) order form requirement will in any way incriminate sellers for the simple reason that sellers will seldom, if ever, be confronted with an unregistered purchaser who is willing and able to secure the order form." *Id.* at 93. The Court affirmed the conviction under 26 U.S.C.A. § 4742(a).

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[2] Leary was convicted of a violation of 26 U.S.C.A. § 4744(a)(2) which makes it "unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) * * * to transport * * * any marihuana" without having paid such tax.

This rationale applies to the cases now before us with as much force as it applied in *Buie*. Accordingly, we conclude that the district court acted properly in denying both Santos and Ward any relief under § 2255 on the basis of their contentions that compliance with § 4742(a) would have had the legal effect of exposing them to real and appreciable risks of self-incrimination.

Both Santos and Ward were also convicted of violating 26 U.S.C.A. § 4744(a)(1) which makes it a crime to acquire marihuana without having paid the transfer tax imposed by Section 4741(a). *Buie* did not deal with Section 4744(a)(1). We adhere to our previous determination that *Leary, supra*, compels the conclusion that convictions under Section 4744(a)(1) cannot be sustained against a Fifth Amendment challenge.[3]

Accordingly, on this remand and in light of *Buie*, the judgment of the district court denying relief to Santos in No. 16985 as to his convictions under 26 U.S.C.A. § 4742 (a) and the related conspiracy counts under 18 U.S.C.A. § 371 is affirmed. Further, the judgment of the district court denying relief to Santos as to his conviction under 26 U.S.C.A. § 4744(a)(1) is reversed. Finally, the judgment of the district court denying relief to Ward in No. 16955 as to his conviction under 26 U.S.C.A. § 4742(a) is affirmed and as to his conviction under 26 U.S.C.A. § 4744 (a)(1) is reversed.

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[3] In *Santos, supra*, 417 F.2d at 342, fn. 1, we did not deem it necessary to reach the question of whether Santos was denied effective assistance of counsel at the trial level. Our subsequent consideration of this claim leads us to the conclusion that it is without merit.

These causes are remanded to the district court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

ORDER DENYING PETITION FOR REHEARING

Monday, June 22, 1970

Before

Hon. JOHN S. HASTINGS, *Sr. Circuit Judge*

Hon. J. EARL MAJOR, *Sr. Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

EFRAIN SANTOS,

Petitioner-Appellant,

No. 16985 vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above-entitled cause be and the same is hereby denied.